NO. 79-1061

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES L. MAEHREN, et al.,
Petitioners,

v.

CITY OF SEATTLE, et al.,
Respondents.

JOHN R. CHURCH, et al.,
Petitioners,

v.

CITY OF SEATTLE, et al.,
Respondents.

RESPONDENT CITY OF SEATTLE'S BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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COUNTERSTATEMENT

These consolidated cases involve a challenge to the affirmative action program of The City of Seattle implemented by selective certification of racial minorities from civil service eligibility registers for promotional positions within the Seattle Fire Department in 1974 and 1976. Such certification occurred at a time when minorities

were still significantly underrepresented within the department, after a history of almost total exclusion only short years before, and in a setting where official and managerial job categories within the department remained almost exclusively occupied by whites. The action in the Maehren case was brought by white employees of the department who sought to be promoted to Fire Lieutenant; in the Church case, it was brought by white employees who sought promotions to Fire Battalion Chief positions.

The pertinent facts of the cases are set out in the recitals of the Court in the opinion included as the Appendix to petitioners' Petition for Writ of Certiorari herein and are otherwise described in respondent Claude Harris' counter-statement of the case.

The questions as presented by petitioners contain and imply an erroneous fact which is fundamental to this Court's understanding of these

cases: namely, that selective certification grants preference solely because of race. Selective certification is a Civil Service rule which reads as follows:

> Where a certification of eligibles other than in the normal order is requested in writing by the appointing authority as being necessary to implement the Affirmative Action Program of the City of Seattle by achieving ratios of minority employees in all classifications of city employment approximately equal to the ratios of these same minorities in the Seattle community, and the Secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles of the particular race, creed, color, national origin or sex designated in the request.

Civil Service Rule 7.03j.

Admittedly, the rule allows race to be considered in employment decisions relative to appointment for open positions and accords an employment privilege because of race (or other disadvantaged group status), which privilege is not granted to non-minority members under the system.[1] However,

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[1] Under the regular system only the top 25% of the register would be certified to the appointing authority when openings occurred because of

all persons selectively certified are fully qualified for appointment because they have passed the civil service examination for the position and

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Footnote [1] continued.

Section 9 of Article XVI of the Seattle City Charter which, when this case arose, read in pertinent part as follows:

> The head of the department or office in which the office classified under this article is to be filled shall notify the commission of any vacancy, and the commission shall certify to the appointing officer the names and addresses, together with notation of military, naval or marine service, if any, of such number of candidates, not less than five if there shall be so many eligible, standing first upon the register for the class or grade to which such position belongs as shall be equal to twenty-five percent of the total number of candidates on said register. The appointing officer shall notify the commission separately of each position to be filled, and shall fill such places by appointment from the persons certified to him by the commission therefor, which appointment shall be on probation for a period of twelve months, except for firemen where such period shall be six months. To facilitate the selection of appointees from the persons so certified, the appointing officer may require such persons to come before him, and shall be entitled to inspect such persons' examination papers, and may fill such postions by appointment from the persons so certified without regard to their order of certification, subject to the preference herein provided for. . . .

are on the eligibility register. Furthermore, as the rule indicates, selective certification is authorized only for remedial purposes to implement affirmative action goals. Therefore, race is not the sole criterion for employment and promotion.

Petitioners also insert in their questions to this Court an issue which was not considered or asserted below, namely, that selective certification is contrary to the City's collective bargaining agreement with the Fire Fighters' Union. In any event, such an issue does not present a federal question.

Additionally, in their questions, statement, and throughout their petition, petitioners incorrectly characterize or take out of context the Washington State Supreme Court's rulings in these cases. They imply that the court's ruling relative to the City's interest in remedying racial imbalance in its work force sanctions corrective action

merely because of disproportionate representation when compared to the local labor market.

A reading of the court's decision belies such interpretation. The court here and below recognized that racial imbalance in the City's work force was the end result of a number of problems and questionable practices within the City, historically and continuing to the times at issue, which had operated to deny minority persons equal employment opportunity. The court's holding is based on its recognition of prior discriminatory employment practices within the City and the Fire Department, and their continuing effects, of then existing practices which arguably violated equal employment opportunity law, and on the court's earlier analysis of the City's practices and its judicial findings of discrimination in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976), cert. den., 429 U.S. 886, 50 L. Ed. 2d 167, 97 S. Ct. 237 (1976). Accordingly, in the cases at bar, it accepted the need for and authorized remedial action in the form

of selective certification to correct and overcome such recognized discrimination determining that the City's interest in remedying the resultant racial imbalance was compelling and justified consideration of race under such circumstances.

It is respondent City's position that certiorari in these cases should be denied because the State court's decision accords with federal law on the subject and no new significant federal question is presented; moreover, that certiorari should be denied because of mootness.

ARGUMENT

I. The Decision of the Washington State Supreme Court is Consistent with this Court's Decisions and the Constitution of the United States and No New Significant Federal Questions Are Presented

Race consciousness for remedial purposes has been recognized as appropriate and approved by this Court in many decisions, the last of which in an affirmative action context have been Steelworkers v. Weber, ___ U.S. ____, 61 L. Ed. 2d 480,

99 S. Ct. __ (1979), and University of California Regents v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).

In Bakke, supra, this Court recognized that preferences based on race are legitimate and justifiable to remedy past discrimination or to ameliorate or eliminate its disabling effects. It recognized that where past discrimination had impeded the progress of minorities, more was required than merely the ending of unlawful acts and the adoption of a neutral stance.

Before Bakke, this Court had recognized an employer's legitimate interest in avoiding disproportionate effects of employment testing devices and had mandated elimination of barriers to employment demonstrated by neutral practices with adverse consequences not shown to be job related. Albemarle Paper Company v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). It had recognized that reducing

disparity in economic conditions caused by a history of discrimination was a compelling governmental interest. Califano v. Webster, 430 U.S. 313, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977).

In Weber, supra, the Court upheld a race-conscious affirmative action program of an employer with a 50% set-aside provision for blacks, under a showing of significant underrepresentation of blacks in the employer's labor force when compared to their composition in the available labor market, and the Court's recognition of historical exclusion of blacks from the crafts, thereby causing an impediment to the normal progression of blacks within the company and resulting in a segregated work force. In approving that affirmative action plan, although not defining the limits of a permissible affirmative action plan, the Court noted that the Kaiser plan, like Title VII, was "designed to break down old patterns of racial segregation and hierarchy" and to "open employment opportunities

for Negroes in occupations which have been traditionally closed to them." Weber at 492. It noted that white employees were not discharged, replaced or barred from advancement by the plan and that the plan was temporary; therefore their interests were not "unnecessarily trammelled."

In the cases at bar, non-minority candidates for Fire Lieutenant and Fire Battalion Chief have not been discharged, replaced, barred from advancement or foreclosed from consideration for appointment to vacancies within those positions; nor do these cases involve set-asides for minorities. All candidates for appointment (minority and non-minority) are qualified for appointment, having passed the Civil Service tests for such positions, albeit, having scored differently on such tests, thereby ranking differently on the registers for such tests. The appointing authority always has discretion to appoint from the eligibles on the certifications made to him. Therefore, while selective

certification allows race to be a factor in the selection process, it does not insulate the minority candidate from comparison with the others for the available openings, and the concerns expressed by the Court in Bakke and Weber are met.

As in Weber, supra, these cases reflect that minorities were significantly underrepresented within the Fire Department work force in general and in managerial positions in particular in the years in question, reflect a pattern of segregation in job divisions within the department, and an historical exclusion of minorities from the department until recent years. Such past exclusion, segregation, and present underrepresentation resulted from a variety of employment practices which the city and the court below recognized had denied employment opportunities to minorities or impeded their progress within the City.[2]

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[2] Suspect selection practices, unvalidated or inadequately validated tests, and various other

The Weber case involved a private employer and the present cases involve a public employer. However, for purposes of Title VII analysis and the appropriateness of a voluntary affirmative action program employing race-conscious devices, such distinction should be without importance because the City too is an employer under Title VII and subject to all of its requirements and allowances. The purposes of the City's program also are to "open employment opportunities" to minorities and

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Footnote [2] continued.

employment practices within the city operating to the disadvantage of minorities had been legislatively recognized by the City in its Ordinance authorizing affirmative action and judicially found to have existed previously by the court in Lindsay v. Seattle, supra. Additionally, the City's Civil Service Commission recognized such discriminatory impediments when it adopted the selective certification rule in 1971. In 1973, the Equal Employment Opportunity Commission charged the City with a variety of unfair employment practices under Title VII of the Civil Rights Act of 1964, as amended. Thereafter, on August 22, 1978, the Commission determined that reasonable cause existed to believe the allegations in its charge were true.

"break down old patterns of racial segregation and hierarchy." Weber at 492. The City's use of selective certification conforms to the permissible ingredients of affirmative action under Title VII this Court has previously identified.

The City's affirmative action conforms to the greater commands of the Constitution as well. Remedying known discrimination and its effects meets the compelling interest test enunciated in Bakke, supra. Respondents argue, however, that private employers and governmental employers should not be distinguished where remedial affirmative action plans in employment are concerned, because while the City is subject to the equal protection provisions of the Fourteenth Amendment, a private employer is subject to the non-discrimination provisions of the Thirteenth Amendment. Johnson v. Railway Express Agency, 421 U.S. 454, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 20 L. Ed. 2d 1189, 88 S.

Ct. 2186 (1968). Therefore, the same standard should apply to both these cases.

In Personnel Administration v. Feeney, ___ U.S. ___, 60 L. Ed. 2d 870, 99 S. Ct. __ (1979), in considering a "veteran's preference" statute as potentially violative of women's rights under the Constitution, this Court reiterated a principle enunciated in Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), and Village of Arlington Heights v. Metro Housing Corporation, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977): namely, that a "racially discriminatory purpose or intent" is required to show a violation of the Equal Protection Clause. In Feeney, it stated that "discriminatory purpose" is more than an "awareness of the consequences"; it means a "course of action" followed "because of its adverse effects upon an identifiable group." Feeney at 60 L. Ed. 2d 888-889.

Affirmative action does not have such an invidious purpose; its purpose is not to affect

adversely the interests of the white majority but to overcome and prevent the continuation of a pattern of discrimination against minorities who have been traditionally and historically deprived. Its purpose is to integrate the races not to segregate them. Its purpose is to bring minorities into the work force in numbers sufficient to allow them to attain the places they would have had but for the racial discrimination visited upon them or affecting them in the past.

The affirmative action plan of The City of Seattle and selective certification is directed toward these ends and conforms with the requirements of the United States Constitution and with earlier decisions of this Court on the same subjects.

II. The Decision of Court Below As To the Appropriate Geographical Area on Which To Predicate A Comparison of Minority Employment With The Relevant Labor Market Does Not Conflict With Decisions Of this Court

Again, petitioners have mischaracterized or misunderstood the state court's determination on

this issue. A review of that opinion clearly demonstrates that the court found the geographical boundaries of Seattle to be the relevant labor market for comparative purposes in affirmative action by the City for a number of reasons. One of such reasons was an analysis of the area from which the majority of the City's labor force is drawn (which is the area petitioners propose for the standard). By asking this Court to consider a larger geographical area, petitioners really continue to ask this Court to consider the Seattle Fire Department as a separate entity, distinct from The City of Seattle. The state court refused to do this, holding "the City, not the Fire Department was the appropriate focus," because it was the actual employer of petitioners, both under the City's Charter and other applicable laws.

The lower court's determination does not conflict with this Court's opinions regarding the

relevant labor market. In Hazelwood School District v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 76 S. Ct. 2736, the Court held that it was for the trial court to determine the relevant labor market, taking into account a variety of facts and circumstances pertinent to the case before it, although it did suggest one appropriate factor would be the availability of teachers in the community from which employees were hired.

In the instant cases, the trial court determined that the relevant labor market was the geographical limits of Seattle for the comparative purposes of the City's affirmative action. It took into account the organization of city government, its territorial jurisdiction, transportation needs, residence requirements, and the area from which most of the City's employees are drawn. Such considerations are reasonable and relevant to a determination of a suitable base on which to make a statistical comparison for its work force.

Moreover, greater liberality must be given a government agency, such as the City, to determine the relevant labor market on which to predicate comparisons for its own employment. The City must appear to and be representative of the population it serves. This is especially so where members of its Fire and Police Department are so visible to and active in the community. Furthermore, the City is not composed of one department but a number of departments. As the lower court observed, "It would be unrealistic to require the City to calculate an appropriate labor area for each of its departments based upon the changing residences of the employees within a department." Appendix to Petition at 19.

The Weber case, supra, also would support use by the City of the geographical area of Seattle for its affirmative action purposes. There, the Court approved Kaiser's affirmative action plan predicated on a statistical comparison of minority representation within the company to their repre-

sentation in the local labor force. Therefore, there is no conflict with federal law and no new federal question raised by the present cases.

III. Selective Certification Does Not Displace Non-Minority Persons; It Enlarges the Pool Of Candidates from which the Appointing Authority May Select

Petitioners again mislead the Court as to the utilization and effect of selective certification in the appointment process. They imply that selective certification displaces non-minority candidates with minority candidates and that the state court is incorrect in its factual analysis of the rule's operation.

It is true that selective certification is a certification from the eligible register of only minority candidates; however, concurrent with that selective certification or before or after, a regular certification containing a mix of candidates from the top 25% of the register is made as well. As the lower court recognized, the Fire Chief always has discretion to appoint or not to

appoint from the certifications and may choose from within the certifications presented him.

In the cases before the Court, four positions for Fire Battalion Chief became available in 1976. To fill these openings, two certifications were made from the eligibility register for the position: a regular certification containing seven names including the petitioners' in the Church case, and a selective certification containing the name of the intervenor in that case, the only minority on the register. In the Maehren case, between November 12, 1973, and May 13, 1975, fourteen Fire Lieutenant openings became available. Eight certifications issued for these positions, only one of which was a selective certification. Thirteen out of the fourteen vacancies were filled with non-minority candidates. Minority candidates in both instances came from a pool of eligible candidates on the register and by the certification process were placed into a pool of candidates for selection by the Chief. Selective certification

merely enlarged the opportunities for minority candidates to be considered for appointments because it allowed the appointing authority to reach further down among the ranked candidates than it otherwise could under the Seattle City Charter. This Court has authorized considerations of race from a pool of candidates in a selection process. Bakke, supra.

If a conflict occurs by this practice, it is a conflict with the City's Charter, not with decisions of this Court. Such a conflict is a state matter and the same was resolved by the state court in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976), cert. den., 429 U.S. 886, 50 L. Ed. 2d 167, 97 S. Ct. 237 (1976).

In any event, as the state court recognized below, ranking of the candidates and the City Charter provisions had operated to impede the progress of minorities and therefore deny them employment opportunities; such ranking or charter requirement had not been shown to be job related

and the effects of such impediments were reflected in the Fire Department.

IV. Actual Victimization of the Person Benefitted By Affirmative Action is not a Prerequisite to Implementation of Affirmative Action. Such An Issue Does Not Present A Significant Federal Question

Petitioners argue that an affirmative action plan should only benefit minorities who individually have established that they were victims of racial discrimination under the City's employment system. While the Court has not addressed this issue directly, it has done so indirectly in Bakke, supra, and Weber, supra, by authorizing or upholding implementation of voluntary affirmative action redounding to the benefit of a victimized class.

Clearly, the persons benefitted by selective certification in the instant cases are within the class of victims of the City's system. Affirmative action for the benefit of a class of victims rather than individual victims is permissible. E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir.

1977), cert. den., 438 U.S. 915, 57 L. Ed. 2d 1161, 98 S. Ct. 3145 (1978); EEOC Affirmative Action Guidelines, 44 Fed. Reg. 4422 at 4427 [29 CFR § 1608.4(c)].

V. Certiorari In Any Event Should Be Denied Because Of Mootness

These cases sought injunctive and declaratory relief below. That relief can no longer be granted. As respondent Harris' response brief indicates, all petitioners in the Church case have since been appointed to positions as Fire Battalion Chiefs in the Seattle Fire Department. Therefore, the issues as to them have become moot. In the Maehren case, over half of petitoners have been appointed as Fire Lieutenants. Additionally, the eligibility registers for both positions -- the registers from which selective certifications were made in both cases -- have expired and are of no further force and effect. (Refer to the Appendix hereto). The issued are therefore moot as to all petitioners.

No present concrete and definite controversy exists on which the Court may effectively act. Lacking such controversy, the Court lacks jurisdiction under Art. III of the United States Constitution. DeFunis v. Odegaard, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974).

CONCLUSION

Respondent City of Seattle submits that the decision of the Washington State Supreme Court in these cases comports with the United States Constitution and decisions of this Court; that no new significant federal issues are raised by the petition; and that, in any event, the cases are moot. Therefore, the petitioners' request for certiorari should be denied.

Respectfully submitted this 22nd day of February, 1980.

GORDON F. CRANDALL
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Attorney for Respondents
City of Seattle, et al.

A P P E N D I X

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A F F I D A V I T

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

CLAUDE HARRIS, being first duly sworn on oath, deposes and says:

I am Chief of Personnel for the Seattle Fire Department and make this affidavit from my personal knowledge and belief.

I reaffirm my affidavit submitted as an Appendix to Respondent Claude Harris' Brief in Opposition in this case and incorporate said affidavit herein.

The following petitioners, who were plaintiffs in the Maehren case, have been appointed as Fire Lieutenant or have retired from the service since the trial of that case:

Charles L. Maehren, Richard J. Schneider, Steve J. Davidson, Rodric S. Mehus, Henry M. Cockerham, Dale T. Smith, Harold L. Jongkindt, Carter W. Hoffman, Keith E. Stevens, Clifford T. Myers, Dale L. Eberling, Michael D. Yager, and Michael R. Heaton.

The registers for Fire Battalion Chief and Fire Lieutenant from which the selective certifications at issue were made and from which the eligibility for appointment to the contested positions was determined have both since expired and are of no further force and effect.

The complaints filed in both of these cases were for injunctive and declaratory relief only.

Claude Harris
CLAUDE HARRIS

SUBSCRIBED AND SWORN to before me this 15 day of February, 1980.

Gordon F Crandall
Notary Public in and for the State of Washington, residing at Seattle